UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Olney M. WARDELL 005815

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2455

Olney M. WARDELL

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR Part e, Subpart J.

By order of 5 March 1986, an Administrative Law Judge of the United States Coast guard at Seattle, Washington, suspended Appellant's license outright for three months upon finding proved the charge of negligence. The specification found proved alleges that Appellant did, under the authority of the captioned license, while serving as pilot aboard the SS GREAT LAND, at or about 1:05 to 1:23 a.m. on 17 March 1985, during the vessel's approach on Cook Inlet and Knik Arm to Terminal 3. Port of Anchorage City Dock, wrongfully fail to properly navigate the vessel thereby causing an allision of the vessel with Terminal 3. Port of Anchorage City Dock.

The hearing was held at Anchorage, Alaska, on 4,5,6, and 7 November 1985. Appellant was present at the hearing, and was represented by professional counsel. He denied the charge and specification.

The Investigating Officer introduced in evidence the testimony of eight witnesses, and also introduced thirty-four exhibits.

Appellant introduced eleven exhibits, his own testimony, and the testimony of four additional witnesses.

The complete Decision and Order of the Administrative Law Judge was served on Appellant on 11 March 1986. Appeal was timely filed on 31 March 1986, and was perfected on 30 May 1986.

FINDINGS OF FACT

At all times relevant to this appeal Appellant was serving as pilot of the U.S. GREAT LAND under the authority of the captioned license. At approximately 8:00 p.m. on 16 March 1985 Appellant assumed the conn at the entrance to Cook Inlet, and retained it until the allision with the dock at 1:23 a.m. on 17 March 1985. The GREAT LAND is a roll-on/roll-off freight vessel of 17,527 gross tons, 744 feet in length. The voyage out of which this proceeding arose was from Tacoma, Washington, to Anchorage, Alaska, with a load of 284 containers and 66 automobiles. All propulsion and steering machinery was operating properly during the period leading up to and at the time of te allision.

Cook Inlet in the vicinity of Anchorage runs generally northeast and southwest. To moor a vessel the size of the GREAT LAND port side to the Anchorage city dock, the vessel must proceed from a turn to port at Point MacKenzie to a point off the dock approximately one mile, with a microwave tower near the dock on a turn bearing of 115-120 degrees true and the vessel must commence a hard turn to starboard which will bring it alongside the dock after a turn of approximately 180 degrees. It is important that the vessel be in the appropriate position at the beginning of the turn in order to ensure that there will be enough room to complete the turn before reaching the dock, this turn for the dock is started, the vessel is committed to completing the turn, and cannot abort the maneuver without a serious risk of grounding.

During the approach to the dock turning point in the instant case the GREAT LAND got off track to the east (right). Appellant was navigating primarily by "seaman's eye," and did not plot fixes on the chart. Appellant realized the vessel was to the right of track, and attempted to get back on track by steering courses to the left of 030 degrees. The course corrections were not sufficient to bring the vessel to the desired turn point. The net result was that when the GREAT LAND reached the turn bearing of 116 degrees true on the microwave tower, the ship was substantially to the east of the desired turning point, and on a heading of approximately 007 degrees true, rather than the desired heading of 030 degrees.

During the turn, Appellant realized that the GREAT LAND was not turning fast enough to make the mooring. He ordered the engines put at full sea speed ahead in an effort to increase the rate of turn of the ship. When Appellant realized that the ship still was not going to make the turn in the available maneuvering room it was already too late to avoid hitting the dock. Appellant ordered the engines put

full astern, radioed the supervisor ashore to clear the dock, and headed the ship into the dock to avoid hitting a ship moored ahead.

The GREAT LAND struck the Anchorage City Dock at 1:23 a.m. going approximately four knots. Substantial damage was incurred by both the dock and the GREAT LAND.

BASES OF APPEAL

Appellant makes the following contentions on appeal:

(1) The Administrative Law Judge's determination of negligence was not in accordance with law and was in excess of the scope of his duties.

(2) The Administrative Law Judge erred in admitting and considering testimony and evidence by the investigating officer.

(3) The decision and order of the Administrative Law Judge is not supported by the reliable, probative, and substantial evidence of record.

(4) The final order of the Administrative Law Judge is overly severe and founded on impermissible considerations.

Appearance: Gilmore & Feldman, 310 K Street, Suite 308, Anchorage, Alaska, 99501-2095, by James D. Gilmore.

OPINION

I

Appellant contends that the Administrative Law Judge erred in finding him negligent based on his failure to plot fixes. He contends that this finding violated his constitutional right to due process and rights under the Administrative Procedure Act because the failure to plot fixes was alleged in a negligence specification that was dismissed with prejudice at the beginning of the hearing. I do not agree.

The charge of negligence against Appellant originally included a specification alleging that during the approach of the GREAT LAND on Cook Inlet and Knik Arm, Appellant wrongfully failed to ensure that the ship's position was plotted on a chart of the area, in violation of 33 CFR 164.11(c). That regulation requires the "owner, master,

or person in charge of each vessel underway" to ensure that "[t]he position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position." The specification was dismissed with prejudice at the beinning of the hearing on the motion of the Investigating Officer. Apparently the reason for the dismissal was that Appellant was not the "owner, master, or person in charge of the vessel."

Appellant now contends that the Administrative Law Judge found him negligent only because he did not plot fixes. Appellant claims that his due process rights under the constitution and his right to be informed of the charges against him under the Administrative Procedure Act and the regulations governing the proceedings were violated by finding him negligent based on the failure to plot after the specification had been dismissed.

Appellant states that the Administrative Law Judge did not rely on any presumption of negligence in finding the charge proved. (Brief at 5). This misstates the Decision and Order of the Administrative Law Judge. The Administrative Law Judge found that the presumption of negligence that arises when a moving vessel strikes a fixed object applied in this case. (Decision and Order at 26). He further found that the presumption was not successfully rebutted by Appellant. (Decision and Order at 28). The Administrative Law Judge could have ended his discussion at that point, and the conclusion that the charge of negligence was proved would have been correct. The Administrative Law Judge chose, however, to discuss actions that Appellant took, or failed to take, constituting negligence. (Decision and Order at 28). One of these was the failure to plot fixes. While 33 CFR 164.11(c) apparently did not apply to Appellant in this case because he was the pilot, rather than the master, it is still indicative of the standard of care required in directing a vessel's movements. SeeAppeal Decision 1515 (EWING). Other failures of Appellant noted by the Administrative Law Judge are navigating solely by seaman's eye, and failing to use all means available to fix the position of the ship. (Decision and Order at 30). See Appeal Decision 2373 (OLDOW). These factors could properly be considered by the Administrative Law Judge in determining whether Appellant was negligent.

II

Appellant next contends that the Administrative Law Judge erred in admitting and considering testimony of and exhibits created by the Investigating Officer.

I agree that allowing substantial testimony by the Investigating Officer was in error. Appeal Decision 1716 (ROWELL). However, Appellant has failed to show that he was prejudiced by this error. The Investigating Officer had constructed a trackline of the GREAT LAND based on records of the speeds of the ship and courses traveled. (Tr. at 327). This amounted to expert testimony by the Investigating Officer. However, this evidence could not have prejudiced Appellant because it was discredited on cross-examination of the Investigating Officer. Cross-examination revealed that the Investigating Officer did not correct for errors in the gyrocompass and course recorder in constructing the trackline, nor did he allow for propeller slippage in calculating ship speeds from propeller RPM. (Tr. at 346-63). There is no indication that the Administrative Law Judge relied on the Investigating Officer's testimony in finding Appellant negligent. In any event, the finding of neglignce can be upheld based solely on the presumption of negligence that arises in allision cases. Therefore Appellant could not have been prejudiced by the Investigating Officer's testimony.

III

Appellant next contends that the finding of negligence by the Administrative Law Judge was not proved by reliable, probative, and substantial evidence. I do not agree.

As noted supra, the presumption of negligence that arises in allision cases applies in this case. Appellant contends that the presumption could not be relied upon in this case because the Investigating Officer introduced evidence of actual negligence. Considering evidence of negligence does not preclude reliance on the presumption of negligence arising from an allision. Appeal Decision 2402 (POPE).

Appellant contends that he rebutted the presumption by offering evidence that the cause of the allision was the current in the vicinity of the dock. This evidence essentially consisted of testimony that the GREAT LAND did not swing through her turn to the dock as rapidly as expected, and that the cause must have been an unusual current. (Tr. at 581; Wright deposition at 30, 40). No proof of the actual direction and strength of this current was offered. This evidence is not sufficient to rebut the presumption of negligence. See Appeal Decision 2174 (TINGLEY), aff'd. sub nom., Comandant v. Tingley, NTSB Order EM-86, aff'd. mem. sub nom. Tingley v. United States, 688 F.2d 848 (9th Cir. 1982). The Administrative Law Judge correctly found the presumption

unrebutted in this case.

Even if Appellant's contention that the current affected his turn toward the dock is accepted, it does not absolve Appellant of negligence. A pilot is held to a very high standard of performance, and is charged with knowledge of the currents and other conditions in the area to be transited, and is obligated to take the necessary measures to counteract the effects of such currents. Appeal Decisions 2370 (LEWIS), 2367 (SPENCER), and 2284 (BRAHN). There is no substantial evidence that the current was such that a reasonably prudent pilot could not have compensated for it so as to dock his ship safely.

Appellant also contends that the Administrative Law Judge's finding that the GREAT LAND was closer than normal to the dock when the turn to the dock was commenced was not supported by substantial evidence. There was conflicting evidence on this point. Appellant argues that the evidence indicating that the GREAT LAND was not closer than normal to the dock should have been relied upon, while the evidence indicating that the GREAT LAND was closer than normal to the dock should not have been relied upon.

The Administrative Law Judge's findings of fact will be upheld on appeal unless they are inherently incredible or clearly erroneous. Appeal Decisions 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFF), and 2302 (FRAPPIER). The Administrative Law Judge found that the GREAT LAND was closer to the dock than normal when it started its turn to the dock. (Decision and Order at 17). That finding is supported in the record, is not clearly erroneous, and will not be overturned here.

IV

Appellant's final contention on appeal is that the order of the Administrative Law Judge suspending Appellant's license is overly severe and founded on impermissible considerations. I do not agree.

Appellant contends that it was improper of the Administrative Law Judge to consider the amount of damage sustained by the dock and ship due to the allision in determining the order to be entered against him. However, the regulations governing the proceedings provide that the Administrative Law Judge may consider "evidence of mitigation or aggravation." 46 CFR 5.569(b)(3). Aggravation is not defined in the regulations, but the amount of damage occurring in an allision is an indication of the possible consequences involved in negligent maneuvering of the ship, and may properly be considered as a matter in

aggravation. This is not to say that the amount of damage is determinative of the proper order; it is merely one factor to consider. The Administrative Law Judge considered it along with other factors, including Appellant's clean disciplinary record for over forty years.

Appellant complains that the order of the Administrative Law Judge was more severe than hisconduct warranted. However, the order imposed at the conclusion of a case is exclusively within the discretion of the Administrative Law Judge, and will not be modified on appeal unless clearly excessive. Appeal Decision 2391 (STUMES). The order in this case is not clearly excessive. Though the Administrative Law Judge is not bound by t he Suggested Range of An Appropriate Order found in 46 CFR 5.569, Appeal Decision 2362 (ARNOLD), I note that the order issued in this case, suspension for three months, is within the suggested range for an offense of negligently performing duties related to vessel navigation.

CONCLUSION

Having reviewed the record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. Except as previously noted, the hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated at Seattle, Washington, on 5 March 1986, is AFFIRMED.

JAMES C. IRWIN
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 20th day of JULY 1987.

3. HEARING PROCEDURE

.59 Investigating Officer

findings upheld unless unsupported

order not modified unless obviously excessive

.60 Modification of ALJ's Order

not modified unless obviously excessive

Appeals Cited: 2402, 2391, 2373, 2370, 2367, 2362, 2356, 2344, 2340, 2302, 2284, 2174, 1716, 1515

Cases Cited: Tingley v. United States

Statutes Cited: None

Regulations Cited: 33 CFR 164.11(c)
46 CFR 5.569
46 CFR 5.569(b)(3)

***** END OF DECISION NO. 2455 *****